

Paper No. 14  
DEB

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

JAN. 11, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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BROWN & BIGELOW, INC.  
v.  
WILLIAM L. COMMINS, III

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Cancellation No. 25,190

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Linda M. Bryne and Daniel M. Pauly, of MERCHANT GOULD SMITH  
EDELLE WELTER & SCHMIDT, P.A., for Brown & Bigelow, Inc.

William L. Commins, III, *Pro Se.*

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Before Simms, Walters and Bucher, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Brown & Bigelow, Inc. has petitioned to cancel the  
registration owned by William L. Commins, III, for the mark  
MAVERICK for "entertainment services in the nature of magic

acts."<sup>1</sup> As the ground for cancellation, petitioner alleges priority of use and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). Petitioner alleges that it is a leading manufacturer of playing cards sold under the MAVERICK trademark, having extensively used MAVERICK as a trademark in the United States since 1963. Petitioner is also the owner of an incontestable registration for the word MAVERICK for "playing cards."<sup>2</sup>

In its answer to the petition to cancel, respondent denied the salient allegations, especially those regarding likelihood of confusion. However, respondent failed to respond to further papers after providing his answer, and filed no testimony, evidence or brief. Petitioner has submitted the deposition testimony of Philip R. Jungwirth, Senior Vice President of Administration for petitioner, along with the attached exhibits including a status and title copy of its pleaded registration; and, has relied on petitioner's requests for admission, along with its statement that respondent failed to respond to this request. Only petitioner has filed a brief. No oral hearing was

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<sup>1</sup> Registration No. 1,972,469, issued May 7, 1996 from an application filed on December 6, 1994, which sets forth dates of first use of July 24, 1991.

<sup>2</sup> Reg. No. 786,728, issued on March 16, 1965, which sets forth dates of first use of October 2, 1963; renewed.

requested. Based on the record before us, we grant the petition to cancel.

PRIORITY

Petitioner has submitted a status and title copy of its pleaded registration. Additionally, petitioner has taken the deposition testimony of Philip R. Jungwirth, Senior Vice President of Administration for petitioner, wherein he also traced the history of the usage of MAVERICK on playing cards, by petitioner and its predecessors, back to 1963. This clearly precedes the filing date of respondent's registration, the date to which respondent is entitled in the absence of evidence of use.

ISSUE: Likelihood of Confusion

The more difficult issue before this Board is whether the facts of this case present a likelihood of confusion. In the course of rendering this decision, we have followed the guidance of In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), which sets forth the factors which, if relevant, should be considered in determining likelihood of confusion.

While the marks herein are identical, the relationship between petitioner's playing cards and registrant's entertainment services is a more difficult question. In spite of petitioner's several arguments, one's first impression is that these two items are only tangentially related. Petitioner argues correctly that playing cards are used in magic shows and card tricks. Petitioner also argues that at trade shows where petitioner appears, there will often be magic acts elsewhere on the floor, or at times, might be used specifically to draw customers to petitioner's booth.

However, at first blush, especially under the mark, MAVERICK, it is not clear that consumers, upon seeing the stage-name, MAVERICK, would immediately assume a connection with, or sponsorship by, the owners of MAVERICK brand playing cards, irrespective of how important card tricks may be to respondent's stage act. Using petitioner's logic, any number of other items routinely used by illusionists, magicians, and others who perform tricks in public could be found to be related to this entertainment service (e.g., boxes, trunks, saws, top hats, etc.).

However, petitioner did propound the following requests for admission to respondent:

9. Petitioner's MAVERICK goods are related to Registrant's services, which are performed in conjunction with the MAVERICK mark.
10. Petitioner's MAVERICK playing cards could be used in Registrant's performances.

As petitioner points out, given Mr. Commins' failure to respond at all to this request, we are bound to accept the requested admissions as admitted by respondent. See 37 CFR §2.120(j)(3)(i) [A party may file a notice of reliance on the requests for admission and a statement that its adversary failed to respond to the requests for admission.] Thus, in view of these admissions, we find respondent's services to be related to petitioner's goods.

Turning to the other DuPont factors, there is nothing in the record suggesting the mark MAVERICK is weak or in any way diluted as applied to these or related fields. Petitioner has pointed out its successful attempts to police third party usage of this mark in the area of toys and games. We also agree that the purchasers of these goods would be exercising only the level of care of ordinary customers of relatively inexpensive or "impulse" items.

Finally, any doubts about likelihood of confusion must be resolved against the newcomer. See Crown Radio Corp. v. Soundsciber Corp., 506 F.2d 1392, 1393, 184 USPQ 221, 223

(CCPA 1974) (doubt resolved against newcomer in cancellation proceeding).

Given the conclusion that these goods and services are related in the instant case, we have not felt compelled to rule upon whether the MAVERICK mark is well-known or famous as applied to playing cards. Nor have we placed much significance on the fact that petitioner sells playing cards specifically designed to be used in teaching one how to perform basic magic tricks since they are sold under the HOYLE trademark -- not the MAVERICK mark. Use of the MAVERICK mark on these particular goods would certainly make a stronger case for the relatedness of petitioner's goods to registrant's services.

DECISION: Under the facts of this case as presented to this Board, we find a likelihood of confusion and hence grant the petition to cancel. Respondent's registration will be cancelled in due course.

R. L. Simms

C. E. Walters

Cancellation No. 25,190

D. E. Bucher

Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board